

90-10974

Supreme Court, U.S.  
FILED

DEC 26 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

---

In re: BERNARD J. DOLENZ, Petitioner

---

PETITION FOR CERTIORARI

---

Bernard J. Dolenz  
6102 Swiss Avenue  
Dallas, TX 75214  
(214) 821-0220  
TX Bar No. 05957750  
Petitioner, Pro Se

Thomas D. Lardin  
1901 W. Cypress Creek Rd.  
#100  
Fort Lauderdale, FL 33309  
(305) 938-4406  
Counsel for Stuart Yacht  
Builders, Inc.

November 29, 1990

26



## QUESTIONS PRESENTED

I. DO FEDERAL COURTS HAVE ADMIRALTY JURISDICTION OVER A "VESSEL" THAT IS ABOUT 70% COMPLETE, UNDER CONSTRUCTION, AND NEVER COMMISSIONED?

II. DOES THE TRIAL COURT OFFEND DUE PROCESS RIGHTS OF AN OWNER TO DEFEND A DEFENDANT "VESSEL" BY REFUSING TO GRANT A HEARING?

## LIST OF ALL PARTIES

The parties to the proceedings below were the unfinished vessel "Aries Startrek", enrollment No. 555798 as Defendants, and Stuart Yacht Builders, Inc. was the Plaintiff. This was an in rem proceedings. Melissa Keyes was part owner in the vessel and transferred all of her interests to Bernard Dolenz.

G.N. Burdick is President of Stuart Yacht Builders, Inc. and has been represented by Steven Perry, P. O. Drawer 24, Stuart, FL 33495 and Thomas D. Lardin, 1901 W. Cypress Creek Road, #100, Ft. Lauderdale, FL 33309.

Initially, the Defendant vessel was represented by Robert & Reynolds, Suite 308, 319 Clematis Street, West Palm Beach, FL 33402. This case was before the Honorable William J. Zloch. Raymond Seese was the Plaintiff's marine expert.

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	3
STATUTES INVOLVED .....	6
STATEMENT OF FACTS .....	7
SUMMARY OF ARGUMENT .....	10
ARGUMENT .....	12
CONCLUSION .....	19
CERTIFICATE OF SERVICE .....	20
ORAL ARGUMENT REQUESTED .....	20

# TABLE OF AUTHORITIES

	PAGE
ARMSTRONG CORK CO. V. FARREL LINE INC., 81 Fed Sup 848 (DC Pa 1948) .....	16
BURNLEY V. THOMPSON, 524 F 2d 1233 ...	18
CHRISTHILF V. ANNAPOLIS EMERGENCY HOSPI- TAL ASS'N, INC. 496 F 2d 174, appeal after remand 552 F 2d 1070 .....	18
COLLINS V. WOLFSON, 498, F2d 1100 ....	18
GENERAL ENGINE & MACH. WORKS, INC., V. SLAY, D.C. Ala. 1963, 222 F. Supp. 745	
MILLS V. MILLS, 232 Va 94, 348 S.E. 2d 250, 3 VLR 549 .....	19
NILO BARGE LINE, INC. V. M/V BAYOU DU- LARGE, CA MO. 1978, 584 F. 2d 84 .....	13
ROSETTI V. AVONDALE SHIPYARDS, INC., 821 F. 2d 1083 (5th Circuit 1977) .....	15
THAMES TOWBOAT CO., V. THE 'FRANCIS MCDONALD', 254 U.S. 242, 41 S. Ct. 65, 65 L. Ed. 245 (1920) .....	14
TROPWOOD A.G. V. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. L978, 454 F. Supp. 964 .....	13
VILLEGAS V. CARTER, 711 S.W. 2d 624 (Tex 1986) .....	1f

## Miscellaneous

28 USC Section 1254 .....	3
28 USC Section 1333 .....	3, 6, 10
28 USC Section 1651(a) .....	6
46 USC Section 971 .....	3, 6, 10
U.S. CONST. AMEND. 14 .....	18
17 Am Jur 2d 130 .....	19

## OPINIONS BELOW

This unfinished vessel was arrested on July 10, 1986, and was tried on March 16, 1987 in a default posture. The Court had allowed the vessel's attorney to withdraw from the case on the morning of trial, refusing a Continuance, even though the Court a couple of days earlier had denied the Defendant's counsel his Motion to Withdraw as counsel for the Defendant.

Jurisdiction was challenged by Bernard Dolenz on March 18, 1987 when the Court refused to return his phone calls on March 16, 1987 when the Defendant's attorney abandoned the representation of the vessel. Eventually, after many Motions were before the Court, the Court denied Dolenz's Motion to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25,



1987. (Appendix 18-19).

Several Motions and supporting Briefs were given the Court regarding jurisdiction (Appendix 1-4; 7-17; 22-27), all of which culminated in the Court ruling adversely regarding the jurisdictional issue with an Order denying a hearing regarding jurisdiction 02/11/88 (Appendix 28-29).

The Trial Court as well as the Plaintiff failed to send notices of activity regarding the Defendant vessel even though repeatedly requested to do so. The Court never allowed a hearing before the Court even though repeatedly requested, and in fact gave an Order denying a Motion for Hearing 01/15/88. (DR 45) (Appendix 23-24).

While the Court entered a Judgment 02/16/88 in favor of Stuart Yacht Build-

ers, Inc., a final Judgment was entered 07/05/89 styled JUDGMENT FOR COSTS AND ORDER OF RELEASE AND/OR SALE (DR 73) (Appendix 30-36). This Judgment was timely appealed and after Briefs were submitted, the 11th Circuit affirmed the Trial Court's decision 08/20/90 (Appendix 37).

A Motion for Rehearing In Banc was denied by the 11th Circuit 10/16/90 (Appendix 52-53).

#### JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254.

The Appellee invoked jurisdiction pursuant to 28 USC Section 1333 and 46 USC Section 971, which the Appellant/Respondent contends is improper as the "... vessel is incomplete, under construction,

and empty of equipment..." per the U.S. Marshall's return (R1-7 and 8; Appendix 49). Ray Seese's statement that the vessel has never been completely finished or commissioned (R1-38-4 and 5; Appendix 50), and G.N. Burdick's statement is a newspaper article that the boat was about 70% completed (R1-38-6 and 7; Appendix 51).

The Trial Court lacked jurisdiction as it failed to have the underpinning for a maritime contract as pointed out in Brief in Support of a Motion to Dismiss (R1-28), Brief to Support the Motion to Dismiss (R1-34-1 thru 7), Motion for Hearing regarding Jurisdiction and Brief (R1-47), and Memorandum of Law (R1-57-17 et seq).

The 11th Circuit, in an opinion filed December 6, 1989, indicated that the

Appeal from the United States District Court for the Southern District of Florida was timely noticed and indicated THIS APPEAL MAY PROCEED.

The decrees to be reviewed include the Order of the District Court denying the Motion to Dismiss for Lack of Jurisdiction, for Intervention, for Reconsideration on September 25, 1987 (DR 41); the Order denying the Motion for Hearing January 15, 1988 (DR 45); the Order denying Motion for Hearing regarding Jurisdiction on February 11, 1988 (DR 50); the Judgment rendered by the District Court on February 16, 1988 and the Judgment for Costs and Order of release and/or Sale dated 07/05/89 (DR 73); and the decisions of the 11th Circuit affirming the Trial Court's decision dated 08/20/90 and the denial of the Petition for Rehearing dated 10/16/90.

The Respondent herein seeks to invoke the jurisdiction of this Court pursuant to 28 USC Section 1651(a) for the review of all of the above stated Orders and Decisions, particularly those that deal with jurisdiction.

#### STATUTES INVOLVED

28 U.S.C. Section 1333. Admiralty, Maritime and Prize Cases

The District Court shall have original jurisdiction, exclusive of the Courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. Section 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or

marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

#### STATEMENT OF FACTS

The Defendant Aries Startrek had its wood infrastructure built in Tai Pai in 1968, being freighted to this county to have it finished. When the boat owner died, it remained in an estate for many years, being moored in a river. It was hauled from the river, after many years, to have it finished and commissioned. Stuart Yacht Builders, Inc. undertook work to finish this vessel, and to redesign the

hulls. When the work was unsatisfactorily done and with exorbitant costs, the Plaintiff sued in Admiralty in rem. The vessel was arrested on July 10, 1986 with a notation by the U.S. Marshall that the "vessel is incomplete, under construction, and empty of equipment". (R1-7 and 8; R1-12 and 13).

The owner contends that this boat had no business being in the Federal Court as the boat was unfinished, never commissioned, had no superstructure for sailing, and was never navigable or seaworthy as the motors and steering mechanisms were to be properly hooked up by Stuart Yacht. (R1-38-4 and 5; Appendix 50) (R1-38-6 and 7; Appendix 51).

Lyman Reynolds was hired to defend the Defendant Aries Startrek and wanted to withdraw as counsel which was denied on March 12, 1987. The Court called the

case to trial on March 16, 1987 and on that morning, the Court allowed Lyman Reynolds to withdraw as counsel, and at the same time denied continuing the case placing the Defendant Aries Startrek in a default posture. That same morning, the Court refused to accept telephone calls from Bernard J. Dolenz when the Court permitted Lyman Reynolds to abandon the Defendant Aries Startrek. TRANSCRIPT OF MELISSA KEYES, R1-48.

Notices were filed by Claimant Dolenz regarding the Intervention and various Motions to Dismiss for Lack of Jurisdiction. The Court remained insensitive to these Motions for over 6 months, then denied the Motions to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25, 1987. The Zloch Court refused even to allow a hearing by Bernard J. Dolenz in his



Court, and in fact, Dolenz has never even seen the Judge to this date. (Appendix 20-24).

Subsequently, the Court entered a Judgment February 22, 1988 and July 5, 1989. A timely appeal was perfected and the 11th Circuit affirmed the Trial Court, and denied a Motion for Rehearing.

#### SUMMARY OF THE ARGUMENT

I. THE TRIAL LACKS JURISDICTION AND ALL ORDERS FROM THE TRIAL COURT SHOULD BE VOIDED.

Lack of jurisdiction is plain as there is no underpinning for maritime contract pursuant to 28 USC Section 1333 and 46 USC Section 971. Stuart Yacht invoked the invoked the jurisdiction improperly as the vessel was never finished, commissioned and was still under construction.

evidence,

(1) U.S. Marshall upon arresting the vessel 07/10/86 stated: " ... vessel is incomplete, under construction, and empty of equipment..." ((R1-7 and 8; Appendix 50);

(2) Ray Seese, Plaintiff's expert and Marine surveyor states that the vessel has never been completely finished or commissioned...(R1-38-4 and 5; Appendix 50);

(3) Statements of Burdick in a local newspaper article that the Boat is about 70% completed. (R1-38-6 and 7; Appendix 51).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE OWNER BERNARD J. DOLENZ DUE PROCESS TO DEFEND THE DEFENDANT VESSEL.

In this regard, the Zloch Court abused its discretion by allowing the Defend-

ant's attorney to withdraw as counsel on the morning of trial even though Lyman Reynolds knew that both Melissa Keyes and Bernard J. Dolenz had an interest in the vessel. A couple of days earlier, the Zloch court denied this lawyer's Motion to Withdraw as Counsel. The Court allowed the Defendant vessel to be placed in a default posture and ignored the telephone calls to the Court by Bernard J. Dolenz when Lyman Reynolds was allowed to abandon his client for which he was hired and without allowing a Continuance. This conduct seems abhorrent to any system of justice, and neither the Court nor the Plaintiff sent notices to the owner, Bernard J. Dolenz, even though requested to do so.

#### ARGUMENT

Stuart Yacht was to assist in finishing

and building an unfinished vessel, and therefore the work that it had done on the boat could not be grounded in a maritime contract as this relationship did not directly concern navigation or commerce on navigable waters. GENERAL ENGINE & MACH. WORKS, INC., V. SLAY, D.C. Ala. 1963, 222 F. Supp. 745; NILO BARGE LINE, INC. V. M/V BAYOU DULARGE, CA MO. 1978, 584 F. 2d 84; and TROPWOOD A.G. V. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. L978, 454 F. Supp. 964.

The law seems well-settled in GENERAL ENGINE & MACHINE WORKS, INC., supra, which states in a similar situation to the unfinished, uncommissioned Aries Startrek:

'... in order for a maritime lien to arise out of a contract, the contract itself must be of a clearly maritime nature. 2 C.J.S. Admiralty 24.

A maritime contract is an agreement which concerns transportation by sea, relates to navigation or maritime employment, or

involves navigation and commerce on navigable waters. 2 C.J.S. Admiralty 24, note 23.

If a contract is not directly or substantially related to navigation, even though it is to be performed on water, or on board, or for the benefit of a vessel, such contract cannot be enforced in a court of admiralty. The W. T. Blunt, D.C. Mich., 291 F. 899 (1923).

It is well settled that a contract to build a ship is non-maritime and is not within the jurisdiction of admiralty tribunals. THAMES TOWBOAT CO., V. THE 'FRANCIS MCDONALD', 254 U.S. 242, 41 S. Ct. 65, 65 L. Ed. 245 (1920). In that case, hull had been completed and launched. The original builder found itself unable to proceed further and after an agreement with the owner, the appellant towed the hull to another location. More work was accomplished on the hull while it was in possession of the Appellant. The ship was manifestly incomplete when the Appellant received it. The masts were not in, nor were the bolts, beams, and gaff. The forward house was not constructed and she was not in 'condition to carry on any service'. The Appellant worked on the vessel for some six weeks.

The Court was faced squarely with the same issue in The "Francis McDonald" that is presented to this Court in the instant case; ie., whether a contract to furnish materials, work, and labor for the completion of a vessel not sufficiently advanced to discharge the functions for which intended is within the admiralty and maritime jurisdiction of the Federal

## Courts.

The Court held that there was no federal jurisdiction in the cause and stated, 254 U.S. p. 244, 41 S.Ct. p 66, 65 L. Ed. 245;

'Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation'.

Further, 254 U.S. at p. 245, 41 S. Ct. at p.66, 65 L. Ed. 245:

'...we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended'.

It is apparent to the Court that the decisions are harmonious and the law well settled with respect to the rule that all work accomplished before a vessel is actually launched is regarded as original construction.

THE ARIES STARTREK BEING APPROXIMATELY 70% COMPLETE IS NOT A "VESSEL" FOR PURPOSES OF ADMIRALTY JURISDICTION.

In ROSETTI V. AVONDALE SHIPYARDS, INC.,

821 F. 2d 1083 (5th Circuit 1977), the Court addressed on what constitutes a vessel. While this definition deals with a vessel negligence claim under the Longshore and Harbor Workers' Compensation Act, this same definition should also apply to other statutes as well. ROSETTI states:

Unfinished vessel, which was approximately 80% to 85% complete, was not navigable, was "separate entity", was not "vessel" for purposes of admiralty jurisdiction, and therefore, was not "vessel" for purposes of vessel negligence claim under Longshore and Harbor Workers' Compensation Act, even though hull was afloat on navigable waters, where vessel itself was not navigable, where majority of navigation equipment was not installed, where dock trials and sea trial had not taken place, and where no crew had been assigned to vessel. Longshore and Harbor Workers' Compensation Act, s 5 (b), 33 U.S.C.A. s 905 (b); 1 U.S. C.A. s 3.

Lack of jurisdiction may be raised at any time, and when raised, must be examined and decided. ARMSTRONG CORK CO. V. FARREL LINE INC. , 81 Fed Sup 848 (DC Pa

1948).

Here, the Trial Court would not allow a hearing to examine the jurisdictional issue and the 11th Circuit did not seem to address whether or not an unfinished or uncommissioned vessel could have jurisdiction in a Federal Court. It is the Respondent's contention that an unfinished and uncommissioned vessel should not be in Federal Court in Admiralty, and the Briefs given in the Appendix, as well as case law *supra*, suggest that the Trial Court erred in keeping this case before the Court, particularly when the jurisdictional question was brought to the Court's attention.

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE OWNER BERNARD J. DOLENZ DUE PROCESS TO DEFEND THE DEFENDANT VESSEL.



Bernard J. Dolenz, as owner, has been deprived of due process, as he has not had a hearing or been given an opportunity to defend the vessel, even if the Court had jurisdiction. COLLINS V. WOLFSON, 498, F2d 1100; U.S.C.S. CONST. AMEND. 14, BURNLEY V. THOMPSON, 524 F 2d 1233; AND CHRISTHILF V. ANNAPOLIS EMERGENCY HOSPITAL ASS'N, INC. 496 F 2d 174, appeal after remand 552 F 2d 1070.

Furthermore, the Zloch Court abused its discretion in allowing attorney Lyman Reynolds to withdraw on the morning of the trial without giving a continuance. This placed the Defendant Aries Startrek in a default posture.

In VILLEGAS V. CARTER, 711 S.W. 2d 624 (Tex 1986) the Trial Court abused its discretion in denying a Motion to Continuance after allowing the attorney to voluntarily withdraw two days before

trial where the client was not negligent or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a Trial Court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V. MILLS, 232 Va 94, 348 S.E. 2d 250, 3 VLR 549. Most jurisdictions have similar case law. 17 Am Jur 2d 130.

#### CONCLUSION

The Petitioner, Bernard J. Dolenz, prays that this Honorable Court review the foregoing reasons and rule that the Trial Court below lacked jurisdiction, and that

all Judgments and Orders be voided for lack of jurisdiction; alternatively, that in the event that this Court considers the Federal Court to have jurisdiction, that this case be remanded for trial as due process has been denied the Petitioner; that Rule 11 Sanctions be imposed on the Respondent because of its persistence in prosecuting this case in Federal Court knowing that the Aries Startrek was never finished, under construction, and never commissioned; and for general relief.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail on this the \_\_\_\_ day of December, 1990 to Thomas Lardin, 1901 W. Cypress Creek Road, #100, Ft. Lauderdale, FL 33309.

Bernard J. Dolenz

ORAL ARGUMENT REQUESTED